

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs October 30, 2007

**RONALD A. BARKER a/k/a GEORGE N. BAILEY v. STATE OF  
TENNESSEE**

**Appeal from the Criminal Court for Sullivan County**  
**No. C52982 R. Jerry Beck, Judge**

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**No. E2007-00195-CCA-R3-PC - Filed February 19, 2008**

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The petitioner, Ronald A. Barker, a/k/a George N. Bailey, appeals the post-conviction court's summary dismissal of his petition for post-conviction relief. The petitioner fled the jurisdiction prior to his June 2004 sentencing hearing, was sentenced in absentia, and did not appeal the judgment of the trial court. He was later arrested in Florida and ultimately extradited to Sullivan County in April 2006. In January 2007, the petitioner filed a petition for post-conviction relief, making numerous allegations. The post-conviction court found the petition to be untimely in that it was filed beyond the one-year statute of limitations established in the Post-Conviction Procedure Act, Tenn. Code Ann. § 40-30-101 et. seq., and it dismissed the petition without a hearing. The petitioner appeals, arguing that the one-year of statute of limitations for his filing a post-conviction petition did not begin to run until he was returned to Tennessee in April 2006, and therefore his petition was timely filed. After reviewing the record, we conclude that the statute of limitations expired in July 2005, and that the trial court's filing revised judgments in August 2006 did not toll the statute of limitations. Thus, the petition was untimely filed and properly dismissed. We accordingly affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and DAVID G. HAYES, JJ., joined.

Ronald A. Barker, a/k/a George N. Bailey, Blountville, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; Gene Perrin, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

The record reflects that in April 2004, a Sullivan County jury convicted the defendant of six drug-related offenses. The trial court scheduled a sentencing hearing for June 21, 2004. The petitioner, who was on bond at the time, apparently fled the jurisdiction and did not attend his sentencing hearing; the record reflects that the petitioner's trial attorney was unaware of the petitioner's whereabouts at the time of the hearing. The defendant was sentenced in absentia as a Range II, multiple offender to an effective sentence of sixteen years in the Department of Correction. At that time, the trial court also issued a *capias* for the petitioner's arrest for failure to appear.

On July 1, 2004, the petitioner's trial counsel filed a motion to withdraw. In the withdrawal petition, counsel stated that he had not been in contact with the petitioner since the jury verdict was delivered on April 1, 2004. After the petitioner's sentencing hearing, counsel was advised by the Board of Professional Responsibility to file a withdrawal motion. A court order granting counsel's motion does not appear in the record, but the petitioner asserts that counsel's motion was granted. There is no record of replacement counsel being appointed. No motion for a new trial or notice of appeal was filed in this case.

On April 13, 2005, the petitioner was arrested in St. Augustine, Florida, after the petitioner was discovered using the identity of a man who had died approximately five years earlier. On May 5, 2005, the District Attorney General for the Second Judicial District issued a request to the Tennessee governor's office that Governor Bredesen initiate proceedings to have the petitioner extradited to Tennessee on the failure to appear charge. The Florida governor issued a rendition order on June 8, 2005. The exact subsequent procedural history is unclear,<sup>1</sup> but on April 4, 2006, with the defendant serving a jail sentence in Florida on the identity theft charge, the Gulf County, Florida, Circuit Court dismissed the June 2005 rendition order. According to the petitioner, two weeks after the order dismissing the rendition order was entered, the petitioner was returned to Sullivan County.

According to the order dismissing the post-conviction petition, after the petitioner was returned from Florida, the trial court determined that the Department of Correction (DOC) "was crediting the petitioner with the time he was in Florida and the time he was resisting extradition from Florida," with the DOC "evidently assuming he was in the Sullivan County jail and not a fugitive

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<sup>1</sup>Both the state and the trial court assert that the petitioner resisted extradition. The petitioner asserts that the state did not act on the rendition order. The petitioner admits, however, that on April 14, 2005, he attended an extradition hearing in St. John's County, Florida, and refused to sign an extradition form. The defendant claims that at the hearing, the court stated that the petitioner would be appointed counsel. At two subsequent hearings, in May and June of 2005, the petitioner again refused to sign an extradition form, citing the lack of appointment of counsel.

from justice.” Therefore, the trial court filed amended judgments<sup>2</sup> to “dispute the assumption” of the DOC. In so doing, the trial court stated that the revisions were corrections for clerical errors pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure: “There was no modification of the sentence in the amendments of 2006, and the court only gave [an] explanation of why the petitioner was not allowed service credits while he was a fugitive.” The petitioner did not file a direct appeal of these amended judgments.

On January 2, 2007, the petitioner filed a pro se petition for post-conviction relief in the trial court. In the petition, the petitioner made numerous allegations. The petitioner attacked the validity of his initial arrest and the validity of the arrest warrants and presentments giving rise to the action. The petitioner also claimed that the evidence used against him at trial was illegally obtained, that the prosecution withheld exculpatory evidence, that the evidence used at trial was insufficient to support his convictions, and that he received the ineffective assistance of counsel. The trial court dismissed the petition without a hearing, stating that the defendant did not file his post-conviction petition within one year of his June 2004 judgments of conviction, as is required by statute. The trial court also ruled that the amended judgments did not grant the defendant additional time to file his post-conviction petition. The petitioner appealed the trial court’s dismissal.

### ANALYSIS

The petitioner raises numerous issues on appeal. The state contends that the trial court properly dismissed the petition for post-conviction relief because the petition was filed beyond the one-year statute of limitations established by statute. The petitioner has taken two separate approaches to the state’s argument. In the trial court, the petitioner claimed that the trial court’s revised judgments of conviction from 2006 granted him additional time to file post-conviction petition. On appeal, the petitioner claims that his initial judgments of conviction did not become final until he was returned to Tennessee in April 2006, and therefore the one-year statute of limitations began to run at that time, making his January 2007 post-conviction petition timely.

Tennessee Code Annotated section 40-30-102(a) provides that a claim for post-conviction relief must be filed “within one (1) year of the date of the final action of the highest state appellate court to which appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred.” Tenn. Code Ann. § 40-30-102(a). The statute contains a specific anti-tolling provision, which states:

The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file such

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<sup>2</sup>The order denying the post-conviction petition states that these orders were filed on August 4, 2006. The petitioner’s original post-conviction petition contains two versions of the amended judgments, one dated May 9, 2006, and the other dated August 4, 2006.

an action and is a condition upon its exercise.

Id.

In this case, the trial court's judgment of conviction was entered on June 21, 2004. The defendant claims that because he was not "in custody" at the time the judgment was entered, it did not constitute a final judgment. There is no case law or statutory authority to support the petitioner's assertion. Rather, "[a]s a general rule, a trial court's judgment becomes final thirty days after its entry unless a timely notice of appeal or a specified post-trial motion is filed." State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996) (citing Tenn. R. App. 4(a) and (c)). Because no notice of appeal or applicable post-trial motion was filed in this case, the judgments in this case became final on July 21, 2004.

Regarding the amended judgments, the trial court stated that it entered the judgments pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure, which gives the trial court jurisdiction to correct a clerical error in a judgment after it has become final. However, this court has previously noted that changes under this rule may only be made where "the judgment entered omitted a portion of the judgment of the court or that the judgment was erroneously entered. . . . In the absence of these supporting facts, a judgment may not be entered under the clerical error rule after it has become final." State v. Jack Lee Thomas, Jr., No. 03C01-9504-CR-00109, 1995 WL 676396, at \*1 (Tenn. Crim. App. at Knoxville, Nov. 15, 1995). In this case, the record reflects, and the trial court correctly stated, that there were no errors in the judgments as they were originally entered. Thus, the 2006 amended judgments were entered in error and are void, as they were beyond the jurisdiction of the trial court. See Brown v. Brown, 198 Tenn. 600, 281 S.W.2d 492, 497 (1955). Because these amended judgments were a nullity, they did not start anew the time for filing a post-conviction petition. Applying the statute of limitations established in Tennessee Code Annotated section 40-30-102(a), the petitioner had until July 21, 2005, to file his petition. His petition was filed after this date and was, provided no exception applies, time-barred.

The Post-Conviction Procedure Act provides that a petition may be filed beyond the expiration of the one-year limitations period if the otherwise untimely claim (1) is based on a constitutional right that did not exist at trial, (2) is based on new scientific evidence, or (3) seeks relief from a sentence that was enhanced because of a previous conviction that was later held to be invalid. Tenn. Code Ann. § 40-30-102(b)(1)-(3). None of these circumstances applies in this case. Additionally, the one-year limitations period may be tolled based on due process concerns, which dictate that strict application of the statute of limitations may not deny a petitioner a reasonable opportunity to assert a claim in a meaningful time and manner when the failure to file in a timely manner is due to circumstances beyond a petitioner's control. State v. McKnight, 51 S.W.3d 559, 563 (Tenn. 2001); Williams v. State, 44 S.W.3d 464 (Tenn. 2001); Seals v. State, 23 S.W.3d 272 (Tenn. 2000); Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995). In considering claims which arise after the limitations period has already begun to run, the Tennessee Supreme Court has held that the appellate court must:

(1) determine when the limitations period would normally have begun to run; (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are “later-arising,” determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim.

McKnight, 51 S.W.3d at 563 (quoting Sands, 903 S.W.2d at 301).

Most of the petitioner’s claims contained in his post-conviction petition, and some of the claims he raises on appeal, concern events which occurred before and during trial—before the one-year limitations period commenced. Because such claims are not “late arising,” they do not warrant examination under McKnight. Regarding the petitioner’s claims concerning events that arose after the limitations period began to run, we initially note that the petitioner on appeal takes issue with the state’s failure to extradite him until after a Florida circuit court dismissed the rendition order against him, and he also asserts that the state violated his constitutional rights by failing to notify him that he had been sentenced in absentia. These claims are waived as a matter of law because they are raised for the first time on appeal. See Black v. Blount, 938 S.W.2d 394, 403 (Tenn. 1996). The one “late-arising” claim that is not waived on appeal, the petitioner’s claim of ineffective assistance of counsel based on trial counsel’s withdrawal and failure to file an appeal, was a dilemma of the petitioner’s creation. The petitioner fled the jurisdiction shortly after the jury delivered its verdict in April 2004, and he did not attend his sentencing hearing. After failing to hear from the petitioner for nearly three months, counsel filed a motion to withdraw after being advised to do so by the Board of Professional Responsibility. The petitioner has not provided any evidence to support his claim that before absconding, he requested that his attorney file a direct appeal and argue particular issues on appeal. The petitioner was arrested in Florida living under an assumed name, and on at least two separate occasions before the July 2005 expiration of the limitations period, the petitioner faced an extradition hearing in Florida. The petitioner could have elected to return to Tennessee and address the issues he now seeks to raise, but he refused to do so. In short, the petitioner was not denied the reasonable opportunity to present his claim. Therefore, the post-conviction court’s strict application of the statute of limitations established in the Post-Conviction Procedure Act did not deny the petitioner his right to due process.

### CONCLUSION

In consideration of the foregoing and the record as a whole, we conclude that the post-conviction court properly ruled that the petition for post-conviction was relief was time-barred. We therefore affirm the post-conviction court’s summary dismissal of the petition.

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D. KELLY THOMAS, JR., JUDGE